IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

UNITED STATES OF AMERICA and THE STATE OF WISCONSIN,	)	
Plaintiffs,	)	Civil Action No. 10-C-910
v.	)	Hon. William C. Griesbach
NCR CORPORATION, et al.	)	
Defendants.	)	

UNITED STATES' CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION *IN LIMINE* TO EXCLUDE OPINIONS AND TESTIMONY OF DEFENDANTS' PROPOSED REMEDY CHALLENGE EXPERTS

On August 30, 2012, this Court denied the Defendants' motions to supplement the administrative record in this case with evidence from experts who would support their challenges to the cleanup remedy selected for the Lower Fox River and Green Bay Superfund Site. Dkt. 498. Two of the Defendants, NCR Corporation and Menasha Corporation, nonetheless served reports of such experts on September 7, 2012 – likely because NCR has sought reconsideration of the Court's August 30 ruling. Dkt. 500. The report of NCR's proposed expert, Jeffrey Zelikson, was submitted to the Court with NCR's motion for reconsideration (Dkt. 501-1); the report of Menasha's proposed expert, Paul Fuglevand, is attached to this motion. Both experts attack the methods that the Environmental Protection Agency and the Wisconsin Department of Natural Resources used to devise and document remedy cost estimates for the Site.

As the Court has recognized, CERCLA specifies that "judicial review of any issues concerning the adequacy of any response action taken or ordered by [EPA] shall be limited to the administrative record," 42 U.S.C. § 9613(j)(1), subject to limited exceptions that do not apply here. *See* Dkt. 498 ("I am satisfied that the record is ample enough to allow a reviewing court to determine if the remedy selected fails the arbitrary and capricious standard."). NCR's request to reconsider that ruling has now been fully briefed and it should be denied. This motion seeks a corresponding *in limine* ruling clarifying that the Court will not accept opinions or testimony from Mr. Zelikson, Mr. Fuglevand, or any other expert to support remedy challenge arguments that Defendants may advance at the summary judgment stage or at trial. The Plaintiffs recently moved for partial summary judgment on the propriety of the remedy, based on the applicable law and the administrative record. Dkt. 508.

The Seventh Circuit has emphasized that "[t]he prudent use of the *in limine* motion sharpens the focus of later trial proceedings and permits the parties to focus their preparation on those matters that will be considered" while it also "permits the trial judge to eliminate from further consideration evidentiary submissions that clearly ought not be presented." *Jonasson v. Lutheran Child & Family Svcs.*, 115 F.3d 436, 440 (7th Cir. 1997). Thus, in considering matters governed by record review principles, courts commonly grant motions *in limine* to exclude evidence not contained in the administrative record. *See, e.g.*, *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 823-24 (10th Cir. 1996); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 64-66 (D.D.C. 2002).[1] Among other things, *in limine* rulings are

[1] Courts also have reached the same result through other types of rulings. *See, e.g.*, *Cal. Dep't of Toxic Substance Control v. Alco Pac., Inc.*, 317 F. Supp. 2d 1188 (C.D. Cal. 2004) (excluding evidence outside the administrative record in a CERCLA case by granting a motion for summary judgment as to the appropriate scope and standard of review); *Sch. Dist. of Wis. Dells v. Z.S.*, 184 F. Supp. 2d 860, 874 (W.D. Wis. 2001) (granting summary judgment on the merits with an explicit indication that the court declined to consider two expert reports that were not part of the administrative record); *Sierra Club v. Marita*, 769 F. Supp. 287 (E.D. Wis. 1991) (Reynolds, S.J.) (denying a motion to supplement the administrative record with expert reports).

appropriately used to make clear that expert testimony will not be accepted on issues that are supposed to be adjudicated based on the administrative record. *See, e.g., Callow v. Prudential Ins. Co. of Am.*, No. C07-1247RSM, 2009 WL 1455326, at *2-3 (W.D. Wash. May 21, 2009); *Doe v. Nevada*, No. 02:03CV01500LRHRJJ, 2006 WL 2583746, at *20 (D. Nev. Sept. 7, 2006).

The Plaintiffs' brief in opposition to the Defendants' unsuccessful record supplementation motions demonstrated that the remedy cost estimates for the Site are fully documented and analyzed in the administrative record. *See* Dkt. 441 at 27-31. Thus, the expert testimony proposed by the Defendants will not serve the purpose of "assist[ing] the trier of fact to understand the evidence or to determine a fact in issue." *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007). Even in a non-record review case, a district court has broad discretion to decide the need for expert testimony. *See Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 870 (7th Cir.2001). Here, an advance ruling on this issue will help the parties tailor their summary judgment briefs and ease the preparations for trial.

Conclusion

For the foregoing reasons, the Court should issue an *in limine* ruling that opinions or testimony will not be accepted from Mr. Zelikson, Mr. Fugelvand, or any other expert to support remedy challenge arguments that Defendants may advance at the summary judgment stage or at trial in this case.

Respectfully Submitted,

For the United States of America

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Dated: September 18, 2012

s/ *Randall M. Stone*

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CERTIFICATE OF SERVICE

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